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Martin Loughlin and the tragic politics of public law

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Introduction

The starting-point that I have chosen is a claim that Loughlin's body of work, extending from *The Idea of Public Law*, through to *Foundations* and beyond, is not merely nominally foundationalist, but is also foundationalist in its aspirations.¹ Loughlin states in his introduction that *Foundations* is an 'exercise in retrieval' in the sense that its objective is to 'rediscover the earlier discourse on political right and assess its relevance in the contemporary world'.² This is only a half-truth because *Foundations* not only 'rediscovers' and 'assesses' something, but it also — and perhaps even for the most part — 'refounds' whatever it has found. It 'reconstitutes' its object of study, perhaps even 'constitutionalizes' it.³ From the very start, *Foundations* is a book about instauration, about lost origins and the possibility of their reestablishment in only slightly modified ways.

Throughout the course of its chapters — which make up a genuine *tour de force* in the history of ideas — *Foundations*, then, aspires to re-establish an earlier understanding of public law, one that crosses historical eras as easily as it does jurisdictional borders. The essential characteristic of this particular understanding of public law is, as Loughlin frequently emphasizes, that it is a 'science of political right'. Loughlin's foundationalism thus seeks to overcome or at least to deflate the binary opposition between science and politics.

On the one hand, like *The Idea* before it, *Foundations*, or, rather, the theory in which both books take part, subscribes to a certain 'Kantianesque' epistemology that Loughlin shorthands as 'pure theory'. 'Kantianesque' because it isn't always clear which *Critique* is the engine. Although Hans Kelsen himself does not

¹ Martin Loughlin, *The Idea of Public Law* (Oxford University Press: Oxford, 2003). Martin Loughlin, *Foundations of Public Law* (Oxford University Press: Oxford, 2010). In addition to these texts see e.g. Martin Loughlin, 'The Nature of Public Law', in Cormac MacAmhlaigh, Claudio Michelon and Neil Walker (eds), *After Public Law* (Oxford University Press: Oxford, 2013) 11-24, Martin Loughlin, 'The Concept of Constituent Power', 13 *European Journal of Political Theory* (2013) 218-237, Martin Loughlin, 'Modernism in British Public Law, 1919-79', *Public Law* (2014) 56-67, Martin Loughlin, 'The Constitutional Imagination', 78 *The Modern Law Review* (2015) 1-25

² Loughlin, *Foundations*, at 10.

³ Martin Loughlin, 'What is Constitutionalisation?', in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press: Oxford, 2010) 47-69.

configure prominently in this particular book, and although the few references to 'purity' are restricted to the introduction,⁴ one has to ask why Loughlin has decided to hold on to such a laden term. The answer may be fairly simple. *Foundations* is part of a *scientific* theory, an epithet that Loughlin cultivates with a certain sense of defiance despite all its misleading connotations in the English language.⁵

On the other hand, the discipline of public law that *Foundations* represents — or, rather, that it seeks to re-establish — is a scientific theory on the *political* dimension of a legal phenomenon. This is how *Foundations* runs into the antinomy that it needs, if not to resolve, then at least to appease. Loughlin can't simply ignore the fact that, *sensu stricto*, there can be no epistemologically purified theory of the political, that is, a pure theory that could somehow distance itself appropriately from the political right that it wishes to study, at least not if we are to understand politics in the way Loughlin does. And Loughlin concedes at the outset that a science of political right is 'strictly speaking ... unachievable'⁶ and that its irreconcilable antimony can only be 'negotiated'⁷ through prudential judgement. Hence the approach is characterised as 'political jurisprudence', that is, a prudential stance in relation to law and politics.⁸

By 'prudentially negotiating' this irreconcilable antinomy, Loughlin arrives at a very particular understanding of politics as 'government'. In *Swords and Scales* Loughlin had already specified politics as the way in which humans resolve disputes 'by self-reflection and deliberation on the appropriate pattern of collective life'.⁹ This specification is a choice, or a normative preference that frames the whole theory. *Foundations* itself does not discuss 'the political' in much detail. In his introduction¹⁰, and in various sections of the book, Loughlin does, however, specify that the new element in *Foundations* is its two-fold understanding of political power as both that which is contained and that which, in its very containment, enables. To view public law through the normativist lens of legal positivism will capture well the institutional competences into which power has been contained, something that Loughlin elsewhere calls 'negative constitutionalism'¹¹. But contained and simultaneously institutionalized, power

⁴ Save one that Loughlin somewhat misleadingly annexes to his discussion of Kant's *practical* reason. See Loughlin, *Foundations*, at 130-131.

⁵ On the German tradition of 'legal science' and its significance, see e.g. Martin Loughlin, 'In defence of *Staatslehre*', 48 *Der Staat* (2009) 1-28.

⁶ Loughlin, *Foundations*, at 11.

⁷ Loughlin, *Foundations*, at 11.

⁸ See 'Political Jurisprudence', this volume. See also Loughlin, *The Idea*, at 163.

⁹ Martin Loughlin, *Sword and Scales. An Examination of the Relationship between Law and Politics* (Hart: Oxford, 2000), at 7.

¹⁰ Loughlin, *Foundations*, at 11-12.

¹¹ Loughlin, "The Constitutional Imagination", at 17.

also takes on a 'positive constitutionalist' dimension. In *Foundations*, Loughlin's definition of this enabling dimension of political power is the following:

Political power is a special type of power created by the drawing together of people in a common undertaking. This type of power is founded on the 'consent' of the people, is rooted in trust, and is generated through the imposition of controls and checks on those who hold positions of authority. In this sense, political power is created through the ways in which governing power is institutionalized.¹²

For Loughlin, what makes power 'political' is, then, a 'common undertaking' that has the ability to collect individuals together into something resembling a 'people'. It is this 'consensual' understanding of politics that I would like to contest.

Loughlin has already responded to a similar critique elsewhere.¹³ But my focus is slightly different. I will explicate my reservations about Loughlin's understanding of politics by contrasting it with two 'agonistic' alternatives: with Claude Lefort's notion of 'the political',¹⁴ and Jacques Rancière's understanding of politics as 'dissensus'.¹⁵

Both Lefort and Rancière play a certain, albeit very minor, role in the overall development of Loughlin's theory. But unlike Loughlin, they approach the political phenomenon with a certain 'embeddedness' that I will call 'metapolitical'.¹⁶

¹² Loughlin, *Foundations*, at 11-12.

¹³ Mainly I am referring to Emiliios Christodoulidis's observations about *The Idea* in Emiliios Christodoulidis, 'Public Law as Political Jurisprudence: Loughlin's "Idea of Public Law"', in Emiliios Christodoulidis and Stephen Tierney (eds), *Public Law and Politics. The Scope and Limits of Constitutionalism* (Ashgate: Aldershot, 2008) 35-45, and Loughlin's reply in Martin Loughlin, 'Reflections on *The Idea of Public Law*', in Emiliios Christodoulidis and Stephen Tierney (eds), *Public Law and Politics. The Scope and Limits of Constitutionalism* (Ashgate: Aldershot, 2008) 47-66.

¹⁴ Claude Lefort, *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism* (Alan Sheridan et al trans., Polity: Cambridge, 1986), Claude Lefort, *Democracy and Political Theory* (David Macey trans., Polity: Cambridge, 1988).

¹⁵ Jacques Rancière, *Disagreement. Politics and Philosophy* (Julie Rose trans., University of Minnesota Press: Minneapolis, MI, 1998), Jacques Rancière, *Dissensus. On Politics and Aesthetics* (Steven Corcoran trans., Continuum: London, 2009).

¹⁶ See e.g. Alain Badiou, *Metapolitics* (Jason Barker trans., Verso: London, 2011), Rancière, *Disagreement*, at 81-90.

Pierre Bourdieu once commented on the 'improbability' of sociology as a science by pointing out to how sociologists are always 'at stake' in their own objects of research.¹⁷ This, I would add, is true of all the human sciences. In other words, *the knowledge that 'science' produces about politics participates in the lifeworld phenomenon of politics that it studies*, even when politics is understood in agonistic or polemical terms. This is what I mean by 'metapolitical' as a political account of the political. Schmitt, to take the example closest to Loughlin, cannot present his friend-enemy distinction¹⁸ as an epistemologically 'purified' *a priori* conceptual binary that precedes the act of it being made. Making the distinction is a political act in itself, a 'polemical intervention' that discerns (*krinein, ent-scheiden*) the opposites and, in Schmitt's case, by so doing also nominates and publicizes its own 'enemy', that is, a divisionless and hence seemingly depoliticized liberal legal science.

This is where I find Loughlin falling short. By trying to formulate political right as a 'science of the political', the theory ends up in the 'negotiated' territory that is 'government', which strictly speaking is neither 'scientific' nor 'political'. The alternative would be to work out something resembling a 'metapolitics of public law', as intimated by Rancière. I conclude by reviewing Loughlin's position through the lens of Max Weber's 'vocation lectures'.¹⁹ As with Weber, Loughlin's attempt to 'negotiate' the opposition of science and politics through 'government' gives the theory a 'tragic' character. I will finally elaborate on this tragic element with the help of Massimo Cacciari.²⁰

'The whirlwind of rights'

Claude Lefort's name often comes up in discussions about politics, from Ernesto Laclau and Chantal Mouffe's critical theory of the hegemony of

¹⁷ Pierre Bourdieu, *Sociology in Question* (Richard Nice trans., Sage: London, 1993), at 9.

¹⁸ Carl Schmitt, *The Concept of the Political* (originally published 1927) (George Schwab trans., Expanded ed. edn, University of Chicago Press: Chicago, IL, 2007).

¹⁹ The classic 'anti-Parsonsian' translations by Hans Gerth and C. Wright Mills have been published as Max Weber, 'Politics as a Vocation' (originally published 1919), in Max Weber, *From Max Weber: Essays in Sociology* (Hans Heinrich Gerth and C Wright Mills trans., New ed. edn, Routledge: Abingdon, 2009) 77-128 and Max Weber, 'Science as a Vocation' (originally published 1917), in Max Weber, *From Max Weber. Essays in Sociology* (Hans Heinrich Gerth and C Wright Mills trans., New ed. edn, Routledge: Abingdon, 2009) 129-156.

²⁰ Massimo Cacciari, 'Weber and the Politician as Tragic Hero', in Massimo Cacciari, *The Unpolitical: On the Radical Critique of Political Reason* (Massimo Verdicchio trans., Fordham University Press: New York, 2009) 206-238.

radical democracy²¹ to the post-Heideggerian analyses of Philippe Lacoue-Labarthe and Jean-Luc Nancy.²² The main reason is the distinction that he popularized between *le politique* or politics as a form of regime, usually translated as 'the political', and *la politique* or politics understood as social agency, conflict-ridden by opposing and often irreconcilable interests, usually translated simply as 'politics'.²³ While 'politics' in the latter sense can be understood as the antagonist competition for power in all of its usual guises, Lefort's 'the political' is, in turn, the way in which a given society represents its own unity to itself as a collectivity. Commenting on Raymond Aron, whose radical liberalism is a major source of inspiration here,²⁴ Lefort notes how the term 'the political' is used in at least two ways:

In a first meaning, this term designates a particular domain of the social ensemble; it delimits the source of authority, the conditions and means of its exercise, and the range of its competences. In a second meaning, the *political* refers to the social ensemble itself, for the entire collectivity is affected by conceptions of the nature of power and the mode of the exercise of government. ... decisions made at the top have repercussions in all domains of social life but also ... the representation of authority in the particular sector of politics circulates in some manner throughout the social ensemble. It is in this second sense that it becomes relevant to affirm a 'primacy of the political,' no matter the society under consideration.²⁵

²¹ Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (originally published 1985) (2nd ed. edn, Verso: London, 2001)

²² Philippe Lacoue-Labarthe and Jean-Luc Nancy, *Retreating the Political* (Simon Sparks trans., Routledge: London, 1997).

²³ See also Martin Plot (ed), *Claude Lefort: Thinker of the Political* (Palgrave Macmillan: Basingstoke, 2013). On the discussion more generally, see Oliver Marchart, *Post-Foundational Political Thought. Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh University Press: Edinburgh, 2007). Warren Breckman, *Adventures of the Symbolic. Post-Marxism and Radical Democracy* (Columbia University Press: New York, 2013), at 139-182 in particular, and Martin Breugh and others (eds), *Thinking Radical Democracy. The Return to Politics in Post-War France* (University of Toronto Press: Toronto, 2015).

²⁴ See especially Raymond Aron, *Democracy and Totalitarianism* (originally published 1965) (Valence Ionescu trans., Weidenfeld and Nicolson: London, 1968).

²⁵ Claude Lefort, 'The Political and the Social', in Claude Lefort, *Complications. Communism and the Dilemmas of Democracy* (Julian Bourg trans., Columbia University Press: New York, 2007) 113-123, at 113-114.

Drawing on both the phenomenology of Maurice Merleau-Ponty²⁶ and the psychoanalytic theory of Piera Aulagnier,²⁷ Lefort maintains that 'the political' not only shapes (*mise-en-forme*) collective life into more or less permanent social relations, but that it also stages (*mise-en-scène*) individual interpretations of those relations. Only collective relations and individual interpretations can together provide form and meaning (*mise-en-sens*).²⁸ The dimensions of 'politics' and 'the political' are interwoven into one another in the sense that the antagonistic or conflictual element of political action is always reflected in society's representation of itself, and vice versa. Neither dimension can exist independently of the other.

The two modern political 'regimes' that Lefort has elaborated in detail, namely totalitarianism and democracy, share a kinship, but operate in diametrically opposite ways. In both, 'the political' functions as a symbolic constitution in so far as it locates society's unity in a particular point of power. As regimes, both totalitarianism and democracy attempt to resolve the same problem, namely to come to terms with the empty space that has been left behind once the claim to the transcendental nature of the King's divine power has lost its capacity to represent the corporeal unity of the body politic. Following the symbolic decapitation of the monarch and the dissolution of the kingdom that he represented, power appears as an empty space. Democracy, Lefort maintains, leaves that space empty. In the absence of kings, those who exercise power can only be mortals who occupy its positions temporarily or who can invest themselves in it only by force or by cunning. Unity is unable to efface

²⁶ Especially the posthumous Maurice Merleau-Ponty, *The Visible and the Invisible. Followed by Working Notes* (originally published 1964) (Alphonso Lingis trans., Northwestern University Press: Evanston, 1968), edited by Lefort himself. Lefort's affiliation with his phenomenologist mentor is analyzed in detail in Bernard Flynn, *The Philosophy of Claude Lefort. Interpreting the Political* (Northwestern University Press: Evanston, 2005). On Merleau-Ponty's late philosophy and law, see William S. Hamrick, *An Existential Phenomenology of Law: Maurice Merleau-Ponty* (Springer: Dordrecht, 1987).

²⁷ E.g. Piera Aulagnier, *The Violence of Interpretation. From Pictogram to Statement* (originally published 1975) (Alan Sheridan trans., Brunner-Routledge: Hove, 2001). For her psychoanalytic take on totalitarianism, see Piera Aulagnier, *L'apprenti-historien et le maître-sorcier. Du discours identifiant au discours délirant* (PUF: Paris, 1993), at 237-254. Aulagnier, originally trained by Lacan, was at one point married to Cornelius Castoriadis, Lefort's collaborator from the *Socialisme ou Barbarie* period, 1947-1958. See Christos Memos, *Castoriadis and Critical Theory. Crisis, Critique and Radical Alternatives* (Palgrave Macmillan: Basingstoke, 2014), at 26-45.

²⁸ Claude Lefort, 'The Permanence of the Theologico-Political?', in Claude Lefort, *Democracy and Political Theory* (Polity: Cambridge, 1988) 213-255, at 217-221.

social division. This division is, Lefort claims, the true nature of democracy as a political regime:

Democracy inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain latent.²⁹

In other words, the antagonistic and conflictual nature of 'politics', keeping the symbolic space of power empty, is what characterizes 'the political' of the democratic regime.

Totalitarianism, on the other hand, is an attempt to fill that space, to unify society by placing society itself in the empty space left behind after the regicide and dissolution of the body politic. With violence and repression, totalitarianism attempts to 'weld power and society back together again, to efface all signs of social division, to banish the indetermination that haunts the democratic experience'³⁰, or, in other words, to abolish the 'politics' that would maintain the emptiness of that space. This also has a constitutional dimension. Lefort's democratic state:

goes beyond the limits traditionally assigned to the *état de droit*. It tests out rights which have not yet been incorporated in it, it is the theatre of a contestation, whose object cannot be reduced to the preservation of a tacitly established pact but which takes form in centres that power cannot entirely master.³¹

Democracy is, then, the form of society in which the relationship of law to power is always external. In this 'savage democracy', law is, as Miguel Abensour explains, no longer thought of as an instrument of social conservation, but as a revolutionary source of authority for a society that constitutes itself as the indeterminate entity it is and will always be. In this sense, law is always in excess of what it has established, and once constituted, the constituent force will always reemerge in order to both reaffirm existing rights and to create new ones:

A political stage opens according to which there is a struggle between the domestication of rights and its permanent destabilization-recreation via the

²⁹ Claude Lefort, 'The Image of the Body and Totalitarianism', in Claude Lefort, *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism* (Alan Sheridan et al trans., Polity: Cambridge, 1986) 292-306, at 303-304.

³⁰ Lefort, 'The Image of the Body and Totalitarianism', at 305.

³¹ Lefort, 'Politics and Human Rights', at 258.

integration of new rights, new demands that are henceforth considered as legitimate. According to Lefort, it is the existence of this incessantly reborn protest, this whirlwind of rights, that brings democracy beyond the traditional limits of the 'State of right' [*État de droit, Rechtsstaat*].³²

A *droit politique* indeed in the sense that for Lefort human rights — and even rights more generally — demand specifically a *politics* of human rights, equivalent to a democratic politics. Lefort cannot accept the critique of the early Marx³³ that sees rights merely as a consequence of the decomposition of society into isolated monadic citizens. Even social separation is a modality of man's relation to others. The 'state of right', as Lefort understands it, introduces a 'disincorporation' of both power and right rather than their complete separation. And so the 'state of right' will always include within itself an 'opposition in terms of right':

The rights of man reduce right to a basis which, despite its name, is without shape, is given as interior to itself and, for this reason, eludes all power which would claim to take hold of it whether religious or mythical, monarchical or popular. Consequently, these rights go beyond any particular formulation which has been given of them; and this means that their formulation contains the demand for their reformulation, or that acquired rights are not necessarily called upon to support new rights.³⁴

Of the 'agonists' discussed here, Lefort is, perhaps, initially the furthest from Loughlin. This might be due to Lefort's phenomenological framework, which grates with Loughlin's more formal approach. In *Foundations*, Loughlin does mention Lefort in passing while discussing the political theology of medieval and modern constitutionalism:

³² Miguel Abensour, 'Appendix: "Savage Democracy" and the "Principle of Anarchy"', in Miguel Abensour, *Democracy against the State. Marx and the Machiavellian Moment* (Max Blechman and Martin Breugh trans., Polity: Cambridge, 2011) 102-124, at 108, translation modified.

³³ See Karl Marx, 'On the Jewish Question' (originally published 1844), in Karl Marx, *Marx. Early political writings* (Joseph O'Malley and Richard A. Davis trans., Cambridge University Press: Cambridge, 1994) 28-56.

³⁴ Lefort, 'Politics and Human Rights', at 258. See also Claude Lefort, 'Human Rights and the Welfare State', in Claude Lefort, *Democracy and Political Theory* (David Macey trans., Polity Press: Cambridge, 1988) 21-44, Claude Lefort, 'International Law, Human Rights, and Politics', 22 *Qui Parle* (2013) 117-137 and Flynn, *The Philosophy of Claude Lefort. Interpreting the Political*, at 164-184.

When Lefort refers to the modern democratic foundation as an 'empty place', it is precisely because there is no longer an external authority that underwrites political existence.³⁵

To my mind, Loughlin here misses Lefort's point about the relationship between the empty space and *democracy*. For Lefort, democracy is not merely the absence of an external authority once God has been pronounced dead. Such an absence would simply represent the post-theological vacuum from which both totalitarianism and democracy follow as archetypal variations of modern political regimes. If totalitarianism is the frenzied attempt to fill that empty space with unifying structures that would abolish the social divisions of politics, then democracy and 'right', by contrast, are measured by their ability to keep that space empty. In Lefort's scheme, democracy and 'right' are, in other words, marked by the *resistance* or *opposition* against the totalitarian tendencies of modern capitalism to fill the space, and the name of that resistance is 'politics'.

But in a more recent article Loughlin already comes closer. He notes:

Constituent power exists only insofar as it resists institutionalized representation. Claude Lefort notes that modern democracy leads to the creation of the 'empty place' of the political. The problem is not that it is empty, but that the space is crowded with the many who claim the authentic voice of constituent power. This is his point: legitimacy must be claimed in the name of the people, and the question of who represents the people remains the indeterminate question of modern politics. The function of constituent power is to keep that question open, not least because 'the people-as-one' is the hallmark of totalitarianism.³⁶

With his notion of constituent power, Loughlin clearly aligns himself with Lefort's idea of the political of democracy as an empty space and of a democratic 'constituent' subject whose identity is constantly kept in question. But unlike Lefort, Loughlin's 'relationist method', as he calls it in this instance, is more concerned with resolving a normativist-decisionist dispute than with the democratic object of study. By 'constitutionalizing' the political domain, by bringing the order of government to the 'crowded space', Loughlin's theory runs the risk of promoting what Lefort would regard as the totalitarian tendencies of modern capitalism rather than putting them into question. Constitutionalization fills and coagulates the space of politics. My point here is not that this would be a

³⁵ Loughlin, *Foundations*, at 48.

³⁶ Loughlin, "The Concept of Constituent Power", at 233-234, reference omitted. The article includes other more tacit references to Lefort's notion of the 'people-as-one'.

position that Loughlin intentionally adopts but, rather, a consequence of the epistemological premises of the theory. The political remains subservient to the scientific rationality of the theory when the metapolitical alternative would have been to regard science, including Loughlin's own theory, as one divided and 'divisive' element among others on the political stage.

The polemical intervention

Jacques Rancière addresses the relationship between politics and the disciplines that study it in more open terms.³⁷ He begins his book *Disagreement* with a hypothesis that 'what is called "political philosophy" might well be the set of reflective operations whereby philosophy tries to rid itself of politics, to suppress a scandal in thinking proper to the exercise of politics'.³⁸ This scandal does not concern merely philosophy in the narrow sense but all 'disciplines' dealing with political phenomena. In order to test his hypothesis, Rancière must then differentiate something that can be specified as 'politics' distinguishing it from all that is normally called by that name but for which Rancière famously reserves the term 'police'.

The distinction itself is well covered ground, but let us simply remind ourselves that for Rancière 'police' includes such phenomena as legislative acts, court decisions, initiatives by ministries and other governmental bodies, as well as public administration, or, to put it in a single 'metaphorical condensation', government. As with Michel Foucault's (clearly related) notion of governmentality,³⁹ Rancière's government by 'police' does not necessarily imply a pejorative quality — 'police' can deliver worthy objectives such as education, public health and social security — but it refers to a certain rationality of government:

³⁷ See also Paul Bowman and Richard Stamp (eds), *Reading Rancière* (Continuum: London, 2011), Jean-Philippe Deranty (ed), *Jacques Rancière. Key concepts* (Acumen: Durham, 2010), Todd May, *The Political Thought of Jacques Rancière. Creating Equality* (Edinburgh University Press: Edinburgh, 2008)

³⁸ Rancière, *Disagreement*, at xii. On Rancière's politics, see also Jacques Rancière, *Hatred of Democracy* (Steve Corcoran trans., Verso: London, 2006) and Jacques Rancière, *On the Shores of Politics* (Liz Heron trans., Verso: London, 2007).

³⁹ Elaborated in particular in Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978* (Graham Burchell trans., Palgrave Macmillan: Basingstoke, 2007) and Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Graham Burchell trans., Palgrave Macmillan: Basingstoke/New York, NY, 2008). On Rancière's assessment of the affinities, see Rancière, *Disagreement*, at 28-29.

The police is thus first an order of bodies that defines the allocation of ways of doing, ways of being, and ways of saying, and sees that those bodies are assigned by name to a particular place and task; it is an order of the visible and the sayable that sees that a particular activity is visible and another is not, that this speech is understood as discourse and another as noise.⁴⁰

So how, then, is government by 'police' different from the 'real thing'? In his 'sixth thesis', Rancière describes two ways of 'counting' or of 'accounting for' the parts that make up a community. The first, that is, 'police', considers only 'real' groups as they are defined by differences in their 'functions, places and interests' accounting for the entire social body and excluding the possibility of any remnant or supplement. One can hardly avoid hearing a certain echo of Lefort's notion of totalitarianism here.⁴¹ The second way of counting, that is, 'politics', is a way of disrupting the seemingly totalizing nature of 'police'. 'Politics' counts 'a part of those without part'.⁴² It is worth noting how Rancière's reference to 'counting' and 'accounting for' resonates with the rationality of scientific enquiry. Government by 'police' accounts for the social body as the sum total of its constituent parts and their respective qualifications.⁴³

In other words, government by 'police' represents a way of counting that excludes the possibility of any remainder. All and everything must be accounted for. As a symbolic constitution of the social order, the principle of 'police' is equivalent to 'the absence of void and of supplement'.⁴⁴ 'Politics', on the other hand, in Rancière's terms, is the disruption of the social order that government by 'police' represents. Because an order built on the principle of 'police' is hierarchical by nature, it is based on relations of inequality that both constitute and legitimate the social order as a form of domination. The principle of 'politics', by contrast, is equality, and it furnishes the logic for disruptive interruptions into the workings of government by 'police':

The essence of politics consists in disturbing this arrangement by supplementing it with a part of those without part, identified with the whole of the community. Political dispute is that which brings politics into being by

⁴⁰ Rancière, *Disagreement*, at 29.

⁴¹ On the similarities and differences, see e.g. Oliver Marchart, 'The Second Return of the Political: Democracy and the Syllogism of Equality', in Paul Bowman and Richard Stamp (eds), *Reading Rancière* (Continuum: London, 2011) 129-147, at 129-133.

⁴² Jacques Rancière, 'Ten Theses on Politics', in Jacques Rancière, *Dissensus. On Politics and Aesthetics* (Steven Corcoran trans., Continuum: London, 2009) 27-44, at 36

⁴³ Rancière, 'The Subject of the Rights of Man', at 70.

⁴⁴ Rancière, 'Ten Theses', at 36.

separating it from the police, which causes it to disappear continually either by purely and simply denying it or by claiming political logic as its own. Politics, before all else, is an intervention in the visible and the sayable.⁴⁵

This is all well covered ground. But the contrast illuminates something essential about Loughlin's theory. In his response to Emilios Christodoulidis's criticism of *The Idea*, Loughlin himself takes up Rancière because he feels that there is a certain kinship with the arguments put forward by Christodoulidis.⁴⁶ In a (very insufficient) nutshell, Christodoulidis claims that in reading Schmitt, Loughlin mistakenly draws from the friend-enemy distinction and the autonomy of a 'first order' of the political a 'second order', as the governing that regulates the social conflicts inherent in political life.⁴⁷ Christodoulidis's metapolitical point, as I see it, is that in order to remain political in Schmitt's polemical meaning of the word, Loughlin's 'second order', that is, the management of social conflicts through government, must rest on the same distinction as the 'first order'. In other words, the governmental pacification of social conflicts must itself be seen as part of a 'social conflict'.

Loughlin's riposte is that whatever the merits of Christodoulidis's claims, the criticism misses its mark and serves more as a justification for the critic's own 'revolutionary politics'. Now drawing on Rancière, Loughlin readily admits that *The Idea* had no intention of engaging in the radical politics of justice, freedom or equality but that 'it tries to explain the ways in which, through instituted order, these terms are played out'.⁴⁸ And so Loughlin can conclude that 'for those who adhere to the possibility of a revolutionary politics being realised, the word "politics" in the book can be replaced by the term "the police" without any loss of cogency in its argument'.⁴⁹

The tone of Loughlin's counterargument seems unnecessarily defeatist because it does not take the challenge on but, rather, withdraws into its own comfort-zone. And here again, I think that he does not fully appreciate the meaning of the question regarding the theory's metapolitical qualifications. This issue becomes clearer if we contrast Rancière's point to a less-known article that he has written on his 'method'. There Rancière, writing about himself in the third

⁴⁵ Rancière, 'Ten Theses', at 36-37.

⁴⁶ Although the observation may be plausible, Christodoulidis does not, in fact, deal with Rancière in this instance. See however Emilios Christodoulidis, 'Against Substitution: The Constitutional Thinking of Dissensus', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford University Press: Oxford, 2007) 189-209.

⁴⁷ Christodoulidis, 'Public Law as Political Jurisprudence', at 41-42. This distinction is made in Loughlin, *The Idea*, at 37-42.

⁴⁸ Loughlin, 'Reflections', at 62.

⁴⁹ Loughlin, 'Reflections', at 62.

person, defines 'method' in a Heideggerian sense as a path. Not as a path that one follows but, rather, as the path that one has to carve out in order to show 'how idealities are materially produced'.⁵⁰ Rancière characterises this approach as one that does not produce 'theories of' but, rather, 'interventions on':

They are polemical interventions. This does not only mean that they take a political stance. This means that they imply a polemical view of what ideas are and do.⁵¹

And further on, he presents democracy as such a polemical idea:

'Democracy' is not the concept of a form of power that has been betrayed or misinterpreted. It was, from the very beginning, the object of a struggle. Democracy was invented as a polemical name, designating the unthinkable power of the multitude of those who have no qualification for governing. ... To speak of democracy, this means to speak of the struggle about the word, to draw the map of a battlefield.⁵²

Rancière does not, then, dismiss this idea of a 'method', as reducing his work to 'revolutionary politics', which was the gist of Loughlin's riposte to Christodoulidis. If a political phenomenon like democracy is polemical by nature, then any 'scientifically' motivated approach worth its name will by necessity 'intervene' in the struggles that make up the phenomenon itself. There is no 'external' scientific position available in relation to a political phenomenon. Preferring to stay in the background, the author of *Foundations* tries to avoid making this intervention explicit.

But we can, once again, detect flirtations with the metapolitical position in Loughlin's more recent work. He will, for example, be well aware of Schmitt's argument that even an epistemologically veiled claim about the disinterested position of the scientist — e.g. any claim to a 'pure theory' — is in itself a polemical challenge because it asserts a superiority in relation to the allegedly partisan position that is being challenged.⁵³ This will, then, apply logically even to Schmitt's own definition of politics regardless of whether he openly professes it or not. And although Loughlin is still unwilling to fully embrace the consequences of this position for his own work, the arguments for developing a 'metapolitics of public law' are clearly there.

⁵⁰ Jacques Rancière, 'A Few Remarks on the Method of Jacques Rancière', 15 *Parallax* (2009) 114-123, at 114.

⁵¹ Rancière, "Method", at 116.

⁵² Rancière, "Method", at 116.

⁵³ Schmitt, *The Concept of the Political*, at 65-66. Cf. Loughlin, 'Politonomy'.

Tragic metapolitics

My point, to conclude, has been that *Foundations* starts off with an impossible task, namely to present a scientific theory of a political phenomenon. Instead of looking deeper into this strained relationship, Loughlin attempts to reconcile the antinomy with a form of practical reasoning that he calls 'government'. As such, it satisfies neither the criteria of rigorous science in the Kantian sense that Loughlin frequently alludes to, nor the criteria of politics, if he chooses to align himself with his Schmittian sources of inspiration. I've further tried to argue that in his more recent work Loughlin is beginning to approach the antinomy in new ways, which would suggest a rethinking of the place of politics.

Loughlin's dilemma is, of course, very similar to Max Weber's. But while Weber attempted to clarify the nature of the abyss that separated the scientist from all political commitments, Loughlin is, perhaps, too quick to bridge that gap. And in that sense *Foundations* falls short of its aims. I have suggested that in Loughlin's work after *Foundations* there are already signs of a 'metapolitics of public law' that would allow him, if not to resolve, then at least to investigate the antimony in more detail, before he allows it to sublate dialectically.

As it now stands, however, there is something 'tragic' about Loughlin's impasse. In an introduction to the Italian edition of Weber's vocation lectures,⁵⁴ Massimo Cacciari notes how, for Weber, the vocations of the scientist and of the politician are in open conflict with one another. The conflict is an 'insurmountable contradiction'⁵⁵ that excludes the possibility of any overriding principle that would unify the two. Loughlin tries to bridge this divide with reference to 'prudence' and 'practical reason'. The Weberian scientist's will to knowledge, Cacciari continues, is grounded in decision, but her vocation is also tragic in the sense that, while that decision cannot be inferred from values, it is at the same time intrinsically rooted in them. In answering her call, the scientist takes on a duty to pursue 'pure' value-free knowledge, and the normative nature of this duty aligns her with the politician. Science provides judgements based on the observation of regularities, but it cannot choose between values or prioritize them. Unable to decide between values, the vocation of the scientist can never elevate scientific rationality beyond values:

⁵⁴ Cacciari, 'Weber and the Politician as Tragic Hero', originally Massimo Cacciari, 'Introduzione', in Max Weber, *La scienza come professione. La politica come professione* (Oscar Mondadori: Milano, 2006) v-lx.

⁵⁵ Cacciari, 'Weber and the Politician as Tragic Hero', at 207. The analogy to Loughlin's starting point is worth noting here.

Even the scientist decides, but he decides to understand the struggle of values without taking part in it for anyone, in the exercise and within the limits of his own research. However, in already undertaking a research he has *decided*, and therefore his relation to other vocations is a priori, original. A relation without confusion, absolute distinction without separation.⁵⁶

The Weberian politician, on the other hand, specifically deals with values, promoting the ones that she has chosen. But in their opposing positions on values, the scientist and the politician are not enemies in the polemical sense, one that would include the destruction of the adversary as an end. The one is required to 'tolerate' the other. For Cacciari, this polarity or irresolvable antinomy between science and politics is what defines the tragic nature of Weber's modernity. And I have suggested that Loughlin's *Foundations* — the theory rather than the book — is tormented by a similar antinomy and that his attempts at resolving it are insufficient.

In Cacciari's account, Weber's two protagonists, the scientist and the politician, occupy two different citadels that are incompatible with one another. The conflicting relationship between the two is a *stasis*, historically connected in their origins, and yet continuously perplexed by one another, a 'brotherly enmity between the city of science and the city of politics'.⁵⁷ It is tragic enmity because no battle can assume annihilation as its end. No science can overcome the antinomy: 'The antinomy has no other choice than that of being understood.'⁵⁸ I have suggested that in Loughlin's case a 'metapolitics of public law' may provide a starting point for such an understanding.

⁵⁶ Cacciari, 'Weber and the Politician as Tragic Hero', at 211.

⁵⁷ Cacciari, 'Weber and the Politician as Tragic Hero', at 213.

⁵⁸ Cacciari, 'Weber and the Politician as Tragic Hero', at 212.